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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 46.

HUGH W. SANFORD, *Petitioner,*

v.

ROBERT C. KEPNER, *Respondent.*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT.

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HUGH W. SANFORD, *Petitioner*,

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ROBERT C. KEPNER, *Respondent*.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT.

The Petitioner Has Not Conceded That He Is Not the First Inventor of the Subject Matter of This Controversy.

The Brief of Respondent asserts erroneously that "the Plaintiff had conceded he was not the first inventor" (p. 7), and therefore urges the Court to deny review for lack of a "case or controversy". On the contrary, the Petitioner has urged, both in the District Court and in the Court of Appeals, his priority of invention of the subject matter of the controversy. The Petitioner has never conceded, and does not now concede, that he was not the first inventor of the subject matter here involved.

Petitioner did not urge in his Petition for a Writ of Certiorari that the Court of Appeals erred in deciding the question of priority because it was presumed that this Court would not review the case on priority since that involved a question of evidence which this Court does not

ordinarily review. The question of priority involved an issue of fact as to which there was no diversity of opinion since only the Court of Appeals for the Third Circuit has decided that issue.

The Petitioner Sought Review by This Court of the Question of Law, whether the District Court should have considered the issue of patentability first and foremost even though the issue of priority be decided against the plaintiff. If the District Court committed error in ruling that the issue of patentability should not be decided, this was an error of law that should be corrected without regard to the issue of priority. Certainly there was a "case or controversy" before the Court under Section 4915 R.S., when the error was committed by the District Court.

This Court frequently has granted a Writ of Certiorari to review an interlocutory question of law, in a case under Section 4915 R.S., without deciding the issue of priority, as in *Hoover Co.* v. *Coe*, 325 U. S. 79, where the question presented and decided by this Court was as follows:

> "The question presented is whether a District Court has jurisdiction of a suit under R.S. 4915 to review the refusal of a claim for patent as not reading on the application. The court below answered in the negative."

The argument of Respondent goes solely to the merit of the appeal rather than the question of diversity of opinion between different circuits.

In neither *Triplett* v. *Line Material Co.* (C.C.A. 7), 133 F. 2d 533, nor *Knutson et al.* v. *Gallsworthy* (C.A.D.C.), 164 F. 2d 497, was the issue of priority involved in the Appeal. Both cases turned solely on the interlocutory question of law, the same question presented here for decision, as a result of the contrary opinion of the Court of Appeals for the Third Circuit. In the *Triplett* case neither the Court of Appeals for the Seventh Circuit nor the District Court even passed on the issue of priority. The case in

both Courts involved solely the issue of patentability. The propriety of that decision, contrary from the decision on the same issue in this case in the Court of Appeals for the Third Circuit, is the point sought to be reviewed on this appeal.

It is clear that from a careful consideration of this case that an issue of law is presented which this Court should review on the question presented by the Petition.

Therefore Petitioner stands upon his Petition and all of the reasons therein relied upon for the allowance of the writ.

Respectfully submitted,

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Washington, D. C.
May 29, 1952.